IN RE FEDERAL ACKNOWLEDGMENT OF THE GOLDEN HILL PAUGUSSETT TRIBE

IBIA 97-59-A, 97-60-A Decided June 10, 1998

Requests for reconsideration of a final determination against Federal acknowledgment.

Affirmed subject to supplemental proceeding. Five issues to be referred to the Secretary of the Interior following supplemental proceeding.

1. Indians: Federal Recognition of Indian Tribes: Acknowledgment

   A person who satisfies the definition of "interested party" in 25 C.F.R. § 83.1 may participate in proceedings before the Board of Indian Appeals concerning reconsideration of a final determination to acknowledge or not to acknowledge an entity as an Indian tribe, regardless of whether that person participated in the original proceedings before the Assistant Secretary - Indian Affairs.

2. Indians: Federal Recognition of Indian Tribes: Acknowledgment

   In order to constitute "new evidence" under 25 C.F.R. § 83.11(d)(1), evidence must not have been before the Assistant Secretary - Indian Affairs at the time he/she made a final determination concerning the acknowledgment of an entity as an Indian tribe.

APPEARANCES: Myles E. Flint, Esq., and David T. Buente, Esq., Washington, D.C., Katherine L. Adams, Esq., and D. Evan van Hook, Esq., New York, New York, and Patrick E. Brown, Esq., Albany, New York, for the Golden Hill Paugussett Tribe; David G. Leitch, Esq., and H. Christopher Bartolomucci, Esq., Washington, D.C., for the Golden Hill Paugeesukq Tribal Nation; Daniel R. Schaefer, Esq., and Carolyn K. Querijero, Esq., Hartford, Connecticut, for the State of Connecticut; John H. Barton, Esq., Bridgeport, Connecticut, for the Mayor of the City of Bridgeport; Kenneth E. Lenz, Esq., Cheshire, Connecticut, for Connecticut Homeowners Held Hostage; David F.B. Smith, Esq., Washington, D.C., for Connecticut Attorneys Title Insurance Company; James A. Trowbridge, Esq., Hamden, Connecticut, for Daniel and Charlotte Nyzio, Carol L. Moreau, Frederick Hawie, Robert Daloia, and Cerritelli Chevron Services, Inc.; Sandra J. Ashton, Esq. Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Assistant Secretary - Indian Affairs. 1/

1/ The Assistant Secretary participated in these proceedings only with respect to the determination of interested parties.

OPINION BY ADMINISTRATIVE JUDGE VOGT

The Golden Hill Paugussett Tribe (Petitioner) and the Golden Hill Paugeesukq Tribal Nation (Requester) each seek reconsideration of the "Final Determination Against Federal Acknowledgment of [Petitioner]" which was issued by the Assistant Secretary - Indian Affairs on September 16, 1996, and notice of which was published at 61 Fed. Reg. 50,501 (Sept. 26, 1996). Subject to the supplemental proceeding ordered below, the Board affirms the Final Determination. Following completion of the supplemental proceeding, the Board will refer five issues to the Secretary of the Interior under 25 C.F.R. § 83.11(f).

Background

In 1982, Petitioner submitted a letter of intent to petition for Federal acknowledgment as an Indian tribe. It submitted a documented petition on April 12, 1993. The Bureau of Indian Affairs (BIA) advised Petitioner of deficiencies it perceived in the documented petition, and Petitioner responded with additional information. Third parties also submitted comments, and Petitioner responded to them.

On June 8, 1995, the Assistant Secretary published a Notice of "Proposed Finding Against Federal Acknowledgment of [Petitioner]." 60 Fed. Reg. 30,430. The Notice stated that the Proposed Finding was "based on a determination that [Petitioner] does not meet one of the seven mandatory criteria set forth in 25 CFR 83.7, specifically criterion 83.7(e)." Id.

Following a period for response and comments, the Assistant Secretary issued her Final Determination. The Federal Register notice of the determination stated in part:

> A substantial body of documentation was available about the petitioning entity and its ancestors. None of the documentation demonstrated descent from the historic Paugussett tribe or from any other tribe for [Petitioner]. The available documentation did not demonstrate any American Indian descent, regardless of tribal affiliation. Even if Paugussett or other Indian ancestry could be determined for William Sherman, [2/] descent through one person with Indian ancestry does not meet the requirements of criterion 83.7(e) for tribal descent.
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> [Petitioner] has not demonstrated that its membership is descended from a historic tribe, or tribes that combined and functioned as a single autonomous political entity. Therefore, [Petitioner] does not meet criterion 83.7(e).

2/ The Notice of Final Determination stated that Petitioner claimed "ancestry from the historic Paugussett tribe through a single individual, William Sherman, a common ancestor of the entire present membership."
61 Fed. Reg. at 50,502.

61 Fed. Reg. at 50,502-50,503. The Notice also indicated that Petitioner's petition had been considered under 25 C.F.R. § 83.10(e). 3/ Id. at 50,502.

Petitioner's Request for Reconsideration was filed on December 24, 1996, and was assigned Docket No. IBIA 97-59-A. Petitioner alleged that there was new evidence which could affect the determination; that a substantial portion of the evidence relied upon by BIA was unreliable or of little probative value; that BIA's research was inadequate and incomplete; and that there were reasonable alternative interpretations of the evidence before BIA. Petitioner's Brief in Support of Request for Reconsideration at 94-96. On December 27, 1996, the Board determined under 25 C.F.R. § 83.11(c)(2) that Petitioner had alleged grounds for reconsideration under 25 C.F.R. § 83.11(d). 4/

Requester's Request for Reconsideration was filed on December 26, 1996, and was assigned Docket No. 97-60-A. With respect to this request, the Board made its finding under 25 C.F.R. § 83.11(c)(2) on January 15, 1997. Following that determination, the Board consolidated the two Requests for Reconsideration.

Interested Parties

In response to a request from the Board, the Assistant Secretary furnished a list of persons (i.e., individuals and entities), who were considered interested parties when the matter was pending before BIA. Requester also furnished an extensive list of persons, which it may have

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3/ 25 C.F.R. § 83.10(e) provides:

"Prior to active consideration, the Assistant Secretary shall investigate any petitioner whose documented petition and response to the technical assistance review letter indicates that there is little or no evidence that the group can meet the mandatory criteria in paragraph (e), (f), or (g) of § 83.7.

"(1) If this review finds that the evidence clearly establishes that the group does not meet the mandatory criteria in paragraph (e), (f), or (g) of § 83.7, a full consideration of the documented petition under all seven of the mandatory criteria will not be undertaken pursuant to paragraph (a) of this section. Rather, the Assistant Secretary shall instead decline to acknowledge that the petitioner is an Indian tribe and publish a proposed finding to that effect in the FEDERAL REGISTER. * * *

"(2) If the review cannot clearly demonstrate that the group does not meet one or more of the mandatory criteria in paragraph (e), (f), or (g) of § 83.7, a full evaluation of the documented petition under all seven of the mandatory criteria shall be undertaken during active consideration of the documented petition pursuant to paragraph (g) of this section."

4/ Under 25 C.F.R. § 83.11(c)(2), the Board is required to determine, "within 120 days after publication of the Assistant Secretary's final determination in the FEDERAL REGISTER, whether the request alleges any of the grounds in paragraph (d) of [section 83.11]."

intended as a list of interested parties. The Board allowed persons appearing on either list to show that they were "interested parties" under the definition in 25 C.F.R. § 83.1. 5/ Upon receipt of several requests for "interested party" status, the Board allowed responses from the parties. 6/

[1] In a March 25, 1997, order, the Board made determinations concerning the interested party status of the several applicants. First, however, it addressed an argument made by the Assistant Secretary that, in order to be an interested party before the Board, a person must have requested interested party status when the acknowledgment petition was pending before the Assistant Secretary. The Board stated:

> The definition of "interested party" in 25 C.F.R. § 83.1 does not contain the limitation advocated by the Assistant Secretary. Nor does the Assistant Secretary identify any provision in the regulations that would put potential interested parties on notice that they are required to enter the acknowledgment proceedings by a certain point in the proceedings or lose any right to participate in the future.
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> Moreover, the preamble to the final regulations clearly recognizes that the Board may determine "interested parties" for purposes of reconsideration proceedings before the Board: "The Assistant Secretary and the Interior Board of Indian Appeals (IBIA), respectively, will determine which third parties qualify as interested parties in the formal meeting and the process of review of requests for reconsideration." 59 Fed. Reg. 9283 (Feb. 25, 1994). This statement evidences no intent to limit the Board's authority to determine interested parties in the manner suggested by the Assistant Secretary.
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> The Board concludes that a person who "can establish a legal, factual or property interest in an acknowledgment determination" may be recognized as an interested party in proceedings before

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5/ Section 83.1 provides:

"Interested party means any person, organization or other entity who can establish a legal, factual or property interest in an acknowledgment determination and who requests an opportunity to submit comments or evidence or to be kept informed of general actions regarding a specific petitioner. 'Interested party' includes the governor and attorney general of the state in which a petitioner is located, and may include, but is not limited to, local governmental units, and any recognized Indian tribes and unrecognized Indian groups that might be affected by an acknowledgment determination."

6/ In addition to Petitioner and Requester, these included the Governor and Attorney General of Connecticut, who are interested parties under 25 C.F.R. § 83.1, and a group known as the Connecticut Homeowners Held Hostage (CHHH), which had participated extensively in the proceedings before BIA.

the Board if that person requests an opportunity to participate in the proceedings before the Board.

Mar. 25, 1997, Order at 1-2.

The Board granted "interested party" status to the City of Bridgeport, Connecticut; the Town of Trumbull, Connecticut; Daniel and Charlotte Nyzio, Carol L. Moreau, Frederick Hawie, Robert Daloia, and Cerritelli Chevron Services, Inc., defendants in a land claim suit brought by Petitioner; and Connecticut Attorneys Title Insurance Company, which claimed interested party status as the insurer of many of the landowners who have been sued by Petitioner.

The Board denied interested party status to James P. Lynch, an ethno-historian who had represented CHHH in proceedings before BIA; 7/ Goodwin, Procter & Hoar, LLP, a law firm which had represented landowners in land claim litigation filed by Petitioner; and Rep. James H. Maloney. The Board found that none of these would-be parties had shown that they had a "legal, factual or property interest" in this matter. Further, Rep. Maloney's request was untimely and failed to show service on the established parties.

The March 25, 1997, order also established a briefing schedule and granted Requester permission to file a reply brief, upon the Board's conclusion that, in the unusual circumstances of this case, Requester should be deemed a petitioner for purposes of subsection 83.11(e)(6). 8/

Answer briefs were filed by the State of Connecticut; the City of Bridgeport, Connecticut; CHHH; Daniel and Charlotte Nyzio et al.; and Connecticut Attorneys Title Insurance Company. Reply briefs were filed by Petitioner and Requester.

Discussion and Conclusions

25 C.F.R. § 83.11(d) provides:

> The Board shall have the authority to review all requests for reconsideration that are timely and that allege any of the following:
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> (1) That there is new evidence that could affect the determination; or
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> (2) That a substantial portion of the evidence relied upon in the Assistant Secretary's determination was unreliable or of little probative value; or

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7/ Before the Board, CHHH is represented by Kenneth E. Lenz, Esq. Mr. Lynch sought "interested party" status before the Board as an individual.

8/ Under this provision, reply briefs are allowed only when the party requesting reconsideration is the petitioner.

(3) That petitioner's or the Bureau's research appears inadequate or incomplete in some material respect; or

(4) That there are reasonable alternative interpretations, not previously considered, of the evidence used for the final determination, that would substantially affect the determination that the petitioner meets or does not meet one or more of the criteria in § 83.7(a) through (g).

25 C.F.R. § 83.11(e)(9) and (10) provide:

(9) The Board shall affirm the Assistant Secretary's determination if the Board finds that the petitioner or interested party has failed to establish, by a preponderance of the evidence, at least one of the grounds under paragraphs (d)(1-4) of this section.

(10) The Board shall vacate the Assistant Secretary's determination and remand it to the Assistant Secretary for further work and reconsideration if the Board finds that the petitioner or an interested party has established, by a preponderance of the evidence, one or more of the grounds under paragraphs (d)(1-4) of this section.

In addition to describing the scope of the Board's review authority, these provisions establish the burden and standard of proof for this proceeding.

To the extent a party seeking reconsideration alleges grounds other than those in 25 C.F.R. § 83.11(d), the Board's authority is governed by 25 C.F.R. § 83.11(f), which provides:

(1) The Board, in addition to making its determination to affirm or remand, shall describe in its decision any grounds for reconsideration other than those in paragraphs (d)(1-4) of this section alleged by a petitioner or interested party's request for reconsideration.

(2) If the Board affirms the Assistant Secretary's decision under § 83.11(e)(9) but finds that the petitioner or interested parties have alleged other grounds for reconsideration, the Board shall send the requests for reconsideration to the Secretary. The Secretary shall have the discretion to request that the Assistant Secretary reconsider the final determination on those grounds.

Petitioner's Request for Reconsideration

As indicated above, Petitioner alleges that all four of the grounds for reconsideration in 25 C.F.R. § 83.11(d) are present here. Petitioner also alleges other grounds for reconsideration. Those other grounds are discussed below.

As to Petitioner's allegations under 25 C.F.R. § 83.11(d), the regulatory provisions quoted above, taken together, require that Petitioner establish by a preponderance of the evidence that one or more of those four grounds exist with respect to the Assistant Secretary's conclusion that Petitioner failed to satisfy the criterion in 25 C.F.R. § 83.7(e). See In re Federal Acknowledgment of the Ramapough Mountain Indians, Inc., 31 IBIA 61, 68 (1997).

Petitioner alleges that "there is new evidence that could affect the determination." Under 25 C.F.R. § 83.11(b), Petitioner was required to "include any new evidence to be considered" with its Request for Reconsideration.

Most of Petitioner's arguments concerning new evidence are general in nature, rather than directed to any particular items of alleged new evidence. Petitioner contends that evidence falling into the following categories must be deemed new evidence:

(1) Evidence that was submitted to BIA prior to issuance of the Final Determination but which was not specifically mentioned in the Final Determination or the Final Determination Technical Report;

(2) Documents compiled by Petitioner, apparently from materials furnished by the State after issuance of the Final Determination; and

(3) Evidence which Petitioner hopes to develop concerning another possible line of descent from the historic Paugussett Tribe.

Petitioner argues that "the evidence that BIA ignored, together with the new evidence [Petitioner] has compiled since the close of the comment period, add tremendously to the mass of corroborative proof of William Sherman's descent from the Golden Hill Paugussetts." Petitioner's Brief at 84. Petitioner then lists a number of documents, apparently intermixing previously submitted documents with documents Petitioner has compiled since the close of the comment period. Id. at 86-89. 9/ At page 24 of its Brief, Petitioner mentions other documents as having been furnished by the State on November 6, 1996, and December 6, 1996. These documents are apparently also claimed to be new evidence.

9/ Petitioner cites some of these documents to the materials it filed with BIA and others to the Appendix to its Request for Reconsideration. It appears that Petitioner may be contending that the documents it cites to the Appendix to its Request for Reconsideration are those documents which it "has compiled since the close of the comment period." The Board understands Petitioner's argument with regard to these documents to be that Petitioner did not submit them to BIA))not necessarily that BIA did not have them at all. However, Petitioner's brief is less than clear on this point. In any event, at least two of the documents falling into this category (Petitioner's Appendix at 155 and 159) were included in the Critical Documents transmitted to the Board under 25 C.F.R. § 83.11(e)(8). Thus these two documents, at least, were before the Assistant Secretary when she issued her Final Determination.

Petitioner appears to be contending that the Assistant Secretary was required to list every document she considered in reaching her decision, either in the Final Determination or the Final Determination Technical Report. There is no such requirement in the regulations in 25 C.F.R. Part 83. Petitioner points to no such requirement in any other law governing administrative proceedings, and the Board is aware of none. The Final Determination explicitly states that all documents submitted by Petitioner and others were reviewed. Final Determination at 1-2. The Board declines to assume that this statement is false.

[2] Petitioner offers no rationale for departing from the usual and expected meaning of the term "new evidence" in order to encompass evidence that was before the Assistant Secretary when she issued her Final Determination. In the absence of any support for such a departure, the Board concludes that the term "new evidence," as that term is used in 25 C.F.R. § 83.11(d)(1), includes only evidence that was not before the Assistant Secretary when she issued her Final Determination. Accordingly, none of the documents Petitioner cites to its previously submitted materials can be deemed "new evidence" under subsection 83.11(d)(1).

With respect to any of the remaining documents listed on pages 86-89 or mentioned on page 24 of Petitioner's Brief which were not before the Assistant Secretary when she issued her Final Determination, 10/ Petitioner's task here is to show, by a preponderance of the evidence, that those documents "could affect the determination."

All the documents are 20th century documents, dating from the 1930's to the 1990's. Although Petitioner offers them as corroborative evidence of William Sherman's descent from the Golden Hill Paugussetts, they were all created long after William Sherman's death in 1886. BIA found similar documents unpersuasive evidence of William Sherman's descent. Petitioner offers no plausible argument for the proposition that any of these documents "could affect the determination" that Petitioner failed to satisfy the criterion in 25 C.F.R. § 83.7(e).

With respect to materials furnished by the State, the Final Determination Technical Report states:

> On May 4, 1995, the BIA requested records from the State of Connecticut under [the Connecticut Freedom of Information Act (FOIA)]. This FOIA request pertained to all Indians in Connecticut. The state has sent to the BIA three separate mailings of fewer than 50 pages each. The accompanying letters were dated February 1, February 6, and February 15, 1996. None of the documents were new to the BIA researchers. These materials received from the State have not [been] used in this Final Deter-

10/ As noted above, at least two of the remaining documents were before the Assistant Secretary. For purposes of this decision, however, the Board assumes that some of the remaining documents were not before her.

> mination primarily because no new GHP [Golden Hill Paugussett] materials were contained in the partial FOIA response which the BIA received after the GHP response period had closed. Any other materials sent by the state on the FOIA request will not be opened until after the Final Determination is published. If the petitioner believes new evidence is found, they can request a hearing before the Interior Board of Indian Appeals under Section 83.11 of the acknowledgment regulations.

Final Determination Technical Report at 74. According to the State, BIA requested in April 1996 that the State not send further documents until after the Final Determination was issued, apparently out of concern that, because the comment period had closed, Petitioner and/or Requester would not have an opportunity to comment on them. State's Answer Brief at 68 and n.45. See also October 23, 1996, letter from the Office of the Connecticut Attorney General to the Secretary at 2, Petitioner's Appendix at 218.

Following issuance of the Final Determination, the State sent BIA additional documents on at least three occasions, i.e., October 16, 1996, November 6, 1996, and December 6, 1996, with copies to Petitioner. The State indicated in its December 6, 1996, transmittal letter and in a February 20, 1997, letter that further documents would be forthcoming. Critical Documents, Exhibit Nos. 98-101.

Petitioner contends that it had very little time to assess the documents it received in the December 6, 1996, transmittal before its Request for Reconsideration was due. Further, it contends, there may be new evidence in the documents not yet sent by the State (or not sent at the time Petitioner filed its Request for Reconsideration). In essence, Petitioner seeks to be relieved of the requirement in 25 C.F.R. § 83.11(b) that its Request for Reconsideration "include any new evidence to be considered."

The State argues that none of the documents it has sent or will send are new evidence because other copies of the documents had already been submitted to BIA. Further, it argues, Petitioner has had access to these documents in the State files for many years and has, in fact, obtained some of them under the Connecticut FOIA.

It is true, as the State and other parties contend, that Petitioner was responsible for conducting its own research and thus for locating documents in the State files. The circumstances here, however, are unusual in that the State had undertaken, at BIA's request, to conduct a thorough review of its files. Petitioner might well have intended to rely upon the State's presumed greater expertise in researching its own files. The pace at which the State's work was accomplished, however, was not within Petitioner's control. Thus, the fact that the State did not complete the project prior to Petitioner's deadline for filing its Request for Reconsideration may have worked to Petitioner's detriment. Under these unusual circumstances, the Board finds that Petitioner should be allowed to submit, as possible new evidence, any documents which were included in State transmissions made after the Final Determination was issued, provided those documents were not

before the Assistant Secretary when she issued her Final Determination and were not included with Petitioner's Request for Reconsideration.

For the purpose of considering any such documents under 25 C.F.R. §§ 83.11(d)(1), (e)(9) and (e)(10), the Board will schedule a brief supplemental proceeding, to be conducted in accordance with an order accompanying this decision. Although, as discussed below, the Board will refer a number of issues to the Secretary, it retains jurisdiction over this entire matter pending completion of the supplemental proceeding. The Board takes this step in order to avoid burdening the parties with simultaneous proceedings before the Board and the Secretary.

With respect to the third category of new evidence listed above, Petitioner states that it is "in the process of researching links between the modern Tinney family and the Howde family, who were members of the historic Golden Hill Paugussett Tribe." Petitioner's Brief at 92-93. It contends:

> This effort was undertaken in response to BIA's invalid attempt to apply the "one ancestor rule" to [Petitioner]. Because members of [Petitioner] can clearly demonstrate their lineage through William Sherman, it was not until BIA's unlawful attempt to apply the "one ancestor rule" that [Petitioner], in an abundance of caution, began aggressively pursuing research on the Howde/Tinney line.

Id. at 93. Petitioner states that it "intends to supplement the record before the Bureau if necessary." Id.

With respect to this category of evidence, Petitioner has no colorable argument for relief from the requirement in 25 C.F.R. § 83.11(b) that its Request for Reconsideration "include any new evidence to be considered." Petitioner was made aware no later than June 1995, when the Assistant Secretary issued her Proposed Finding, that BIA did not consider a group descended from a single individual to satisfy the criterion in 25 C.F.R. § 83.7(e).

Petitioner's discussion of its continuing research does not satisfy the requirement in 25 C.F.R. § 83.11(b). Petitioner has failed to produce any evidence concerning the Howde-Tinney family that could affect the determination.

Except with respect to any new evidence that might be produced in the supplemental proceedings discussed above, the Board finds that Petitioner has failed to show by a preponderance of the evidence that there is new evidence that could affect the determination that Petitioner failed to satisfy the criterion in 25 C.F.R. § 83.7(e).

Petitioner next argues that a substantial portion of the evidence relied upon in the Assistant Secretary's determination was unreliable or of little probative value. Petitioner contends that "[t]his is true, for example, of the evidence BIA relied on to disregard [Samuel] Orcutt and [D.H.] Hurd." Petitioner's Brief at 95. Petitioner does not specifically

identify any such evidence, however. Rather, its discussion of Orcutt and Hurd focuses upon its disagreement with BIA as to the reliability of certain works of these writers. Petitioner's Brief at 50-60. Petitioner's challenge is to BIA's assessment of certain evidence, not to any evidence per se.

Petitioner identifies no other examples of BIA's supposed reliance upon evidence that was unreliable or of little probative value.

The Board finds that Petitioner has failed to show by a preponderance of the evidence that a substantial portion of the evidence relied upon in the Assistant Secretary's determination was unreliable or of little probative value.

Petitioner next argues that BIA's research was inadequate and incomplete. Petitioner contends that this

> is clear from both the fact that BIA's Final Determination omitted many documents submitted by [Petitioner], and by the fact that when the Connecticut Attorney General's Office explicitly informed BIA that it had "considerable" additional relevant materials, BIA asked the Connecticut Attorney General not to send those materials, and proceeded with its erroneous expedited denial of the Petition.

Petitioner's Brief at 95.

These contentions are related to the contentions Petitioner made under §§ 83.11(d)(1) and (2). As discussed above, the fact that the Final Determination did not list every document submitted is not proof that the unlisted documents were not considered.

It is perhaps conceivable that BIA's research could be deemed "incomplete" because BIA issued its decision prior to receiving all the documents it had requested from the State. To the extent that this might be the case, Petitioner now has an additional opportunity to prove its contention in the supplemental proceeding discussed above. That is, if Petitioner can produce viable new evidence from the materials furnished by the State after the Final Determination was issued, it may also be able to show that BIA's research was incomplete in some material respect.

As further support for its allegation of inadequate or incomplete research, Petitioner contends: "BIA simply ignored its own contrary, prior reliance on Hurd in other acknowledgment petitions; its own prior reliance on newspaper articles; and its own statement to [Petitioner] that an obituary would help prove William Sherman's descent." Id. As it did earlier, Petitioner directs this argument to BIA's assessment of the evidence. It does not show, or even contend, that BIA's research per se was inadequate or incomplete. 11/

11/ Petitioner's reference to William Sherman's obituary suggests that BIA did not review the obituary. BIA clearly did review the obituary, however, and analyzed it at pages 80-82 of the Final Determination Technical Report. Thus, Petitioner's objection is presumably to BIA's analysis.

Except to the extent that Petitioner may be able to show, by producing viable new evidence in the supplemental proceeding discussed above, that BIA's research was inadequate or incomplete in some material respect, the Board finds that Petitioner has failed to show by a preponderance of the evidence that BIA's research appears inadequate or incomplete in some material respect.

Petitioner next contends that there are reasonable alternative interpretations of the evidence before BIA. Petitioner contends:

> The preamble to the Acknowledgment Regulations clarifies that, under these grounds, the IBIA must vacate a final determination if BIA's interpretation of the evidence was wrong, or if there are valid, credible alternative interpretations of the evidence. Final Rule Preamble, 56 Fed. Reg. at 9291. In order to guarantee the fairness and flexibility appropriate to the complexity of the acknowledgment determination, BIA declined to limit in any way the kinds of alternative interpretations offered for consideration. Id.

Petitioner's Brief at 95-96.

Petitioner evidently refers to the following discussion in the Preamble:

> Comments: Many commenters objected to the additional grounds for reconsideration set forth in § 83.11(d)(4). This paragraph provides that alternative interpretations of evidence, not previously reviewed, may be considered. Commenters interpreted this solely in terms of allowing reversal of positive acknowledgment decisions. One commenter approved of the additional grounds but questioned the competence of the IBIA to utilize them because of its lack of technical expertise. Another commenter wanted this provision limited to expert opinion, with legal opinions barred with regard to this specific ground for reconsideration.
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> Response: The additional grounds are neutral. They allow equally for a positive or a negative decision to be vacated and returned to the Assistant Secretary for reconsideration on the basis that the interpretation used was incorrect or that there are valid, credible alternative interpretations of the evidence. We believe these additional grounds further guarantee fairness and flexibility appropriate to the complexity of these decisions. We do not believe it would be practical or appropriate to attempt to limit in advance the kinds of alternative interpretations offered for consideration.

59 Fed. Reg. 9280, 9291 (Feb. 25, 1994).

In Ramapough, supra, the first case decided under the 1994 regulations, the Board was required to interpret § 83.11(d)(4). The Board there stated:

> The ground for reconsideration set out in 25 C.F.R. § 83.11(d)(4) is: "That there are reasonable alternative interpretations, not previously considered, of the evidence used for the final determination, that would substantially affect the determination that the petitioner meets or does not meet one or more of the criteria in § 83.11(a) through (g)." (Emphasis added.) The Board construes this paragraph as contemplating reconsideration in the case of a reasonable alternative interpretation which BIA, through inadvertence or otherwise, truly did not consider. The Board does not construe the paragraph to apply to an interpretation, even a reasonable one, which BIA has considered and rejected. In other words, the Board does not construe this paragraph as authorizing the Board to reweigh the evidence or to second-guess BIA's interpretation of the evidence that was before it.

31 IBIA at 81.

As Petitioner contends, the discussion in the preamble evidences an intent that § 83.11(d)(4) be interpreted with some flexibility. 12/ However, it is not possible to ignore the explicit requirement in the regulation that an alternative interpretation be one that was not previously considered. This requirement is also mentioned in the preamble. It is arguable that some of the discussion in the preamble is inconsistent with this requirement. 13/ In the case of inconsistency between the regulation and the preamble, however, the regulation itself must control.

In light of the clear language of the regulation, the Board will follow the interpretation of § 83.11(d)(4) articulated in Ramapough.

While alleging various errors of interpretation on the part of BIA, Petitioner argues, in essence, that BIA should have accepted interpretations advocated by Petitioner. Petitioner fails to offer an interpretation of the evidence that BIA did not consider.

Accordingly, the Board finds that Petitioner has failed to show by a preponderance of the evidence that "there are reasonable alternative interpretations, not previously considered, of the evidence used for the final determination, that would substantially affect the determination" that Petitioner fails to satisfy the criterion in 25 C.F.R. § 83.7(e).

12/ Indeed, the Board relied upon the language in the preamble to allow Requester to pursue its Request for Reconsideration before the Board. See discussion below.

13/ In particular, the statement that a decision may be "vacated and returned to the Assistant Secretary for reconsideration on the basis that the interpretation used was incorrect" suggests the possibility that no new interpretation need be offered.

The Board's findings to this point are recapitulated as follows: Subject to further findings following the supplemental proceeding discussed above, Petitioner has not established by a preponderance of the evidence that any of the grounds for reconsideration in 25 C.F.R. § 83.11(d)(1), (2), (3), or (4) are present here.

Petitioner makes a number of other allegations that are not within the Board's limited jurisdiction. Although many of its allegations overlap each other, the Board has identified the following major allegations of error as clearly severable from those of Petitioner's allegations which fall under the Board's jurisdiction:

(1) BIA placed the burden of proof on Petitioner, despite the provisions of 25 C.F.R. § 83.10(e)(1).

(2) BIA adopted a "one-ancestor" rule without following rulemaking procedures and improperly relied on that rule in the Final Determination.

(3) BIA declined to hold a formal meeting, despite the requirement of 25 C.F.R. § 83.10(j)(2).

(4) BIA considered materials submitted by third parties despite a statement in the rulemaking preamble indicating that third-party materials will not be considered until a petition for acknowledgment is placed on active consideration, 59 Fed. Reg. at 9283, and the fact that the limited review process, under which the Final Determination was made in this case, is undertaken prior to active consideration. 25 C.F.R. § 83.10(e).

These allegations of error will be referred to the Secretary under 25 C.F.R. § 83.11(f) following the supplemental proceeding discussed above.

Requester's Request for Reconsideration

Requester's Request for Reconsideration did not specifically allege any of the grounds in § 83.11(d) but did allege other grounds for reconsideration which the Board might have immediately referred to the Secretary under 25 C.F.R. § 83.11(f). However, given the pendency of Petitioner's Request for Reconsideration, an immediate referral of this request would have resulted in an awkward procedural situation in which simultaneous proceedings would be pending before the Secretary and the Board concerning the same Final Determination. Such a situation would have imposed undue burdens on the parties, and perhaps on the Secretary as well. Therefore, the Board gave Requester the benefit of a broad interpretation of § 83.11(d)(4) in order to permit these two Requests for Reconsideration to remain together.

Specifically, the Board cited the above-quoted language from the rulemaking preamble to construe Requester's allegation of BIA error in interpretation of the evidence as an "alternative interpretation" under § 83.11(d)(4), for the threshold purposes of determining whether Requester had alleged any of the grounds in §83.11(d). Given its subsequent holding in Ramapough, the Board will probably not be inclined to construe the

provision so broadly in the future, even in the preliminary stages of a proceeding under 25 C.F.R. § 83.11.

While alleging that BIA erred in interpreting the evidence, Requester, like Petitioner, fails to offer an interpretation of the evidence that BIA did not consider. Accordingly, the Board finds that Requester has failed to show by a preponderance of the evidence that "there are reasonable alternative interpretations, not previously considered, of the evidence used for the final determination, that would substantially affect the determination" that Petitioner fails to satisfy the criterion in 25 C.F.R. § 83.7(e).

The Board finds further that Petitioner has not established by a preponderance of the evidence that any of the grounds for reconsideration in 25 C.F.R. § 83.11(d)(1), (2), (3), or (4) are present here.

Requester makes three other allegations that do not fall within the Board's jurisdiction. Two of those allegations are, in essence, the same as the first two of the four allegations referred to the Secretary above. Requester's similar allegations are likewise referred to the Secretary under 25 C.F.R. § 83.11(f).

Requester also contends that the Final Determination is invalid because Petitioner's submissions to BIA were not properly authorized or certified by the governing body of the Golden Hill group. 14/ Requester contends that neither 25 C.F.R. § 83.4(c) nor 25 C.F.R. § 83.6(b) was complied with in this case, although it concedes that these regulatory provisions were not in effect at the time Petitioner's letter of intent and documented petition were submitted. 15/

Petitioner and Requester each claim to represent the Golden Hill group. It appears that a division in the group's leadership developed in 1993 or

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14/ The Board adopts the terminology of 25 C.F.R. Part 83 and so refers to the Golden Hill entity as a "group" rather than a "tribe." See 25 C.F.R. § 83.1: "Indian group or group means any Indian or Alaska Native aggregation within the continental United States that the Secretary of the Interior does not acknowledge to be an Indian tribe."

15/ 25 C.F.R. § 83.4(c) provides: "A letter of intent [to petition for Federal acknowledgment] must be produced, dated and signed by the governing body of an Indian group."

25 C.F.R. § 83.6(b) provides: "The documented petition must include a certification, signed and dated by members of the group's governing body, stating that it is the group's official documented petition."

Both of these provisions were added in 1994. But see the preamble to the 1991 proposed revision of 25 C.F.R. Part 83: "Section 83.6(b) includes in the revised regulations the requirement detailed in the Bureau's May 16, 1979, policy letter to petitioners that a petition be certified by a group's governing body as the group's official petition." 56 Fed. Reg. 47,320, 47,321 (Sept. 18, 1991).

earlier, perhaps prior to submission of the documented petition on April 12, 1993. Requester's representatives were permitted to participate in proceedings before BIA, but were not considered to represent the petitioning group. The Final Determination Technical Report states at page 73: "The leadership split had no impact on the Proposed Finding and has no impact on the Final Determination under criterion 83.7(e) because the individuals on both membership lists have the same genealogies."

Requester asserts that it cannot be bound by the Final Determination, despite the provisions of 25 C.F.R. §§ 83.3(f) and 83.10(p), because it was not the petitioner. 16/ Nevertheless, it also argues that, in light of the preclusive effect of these regulatory provisions, BIA was required to ensure that the petition it considered was properly authorized by the governing body of the Golden Hill group.

Requester's contention could be read as suggesting that this Board or the Secretary should undertake to determine whether Petitioner or Requester is the proper representative of the Golden Hill group for purposes of seeking Federal acknowledgment. Indeed, Requester argues that it, rather than Petitioner, is the proper representative.

The Board has already found that it is not the appropriate forum for resolution of the group's leadership dispute. See Notice of Determination under 25 C.F.R. § 83.11(c)(2) in Docket No. IBIA 97-60-A, Jan. 15, 1997, at 3. Although it must refer Requester's contention to the Secretary under 25 C.F.R. § 83.11(f), the Board expresses no opinion as to whether the Secretary should undertake to act as such a forum.

Specifically, the question referred to the Secretary in this part of the decision is whether BIA erred in considering Petitioner's petition

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16/ 25 C.F.R. § 83.3(f) provides:

"[G]roups that previously petitioned and were denied Federal acknowledgment under these regulations or under previous regulations in part 83 of this title, may not be acknowledged under these regulations. This includes reorganized or reconstituted petitioners previously denied, or splinter groups, spin-offs, or component groups of any type that were once part of petitioners previously denied."

25 C.F.R. § 83.10(p) provides:

"A petitioner that has petitioned under this part or under the acknowledgment regulations previously effective and that has been denied Federal acknowledgment may not re-petition under this part. The term 'petitioner' here includes previously denied petitioners that have reorganized or been renamed or that are wholly or primarily portions of groups that have previously been denied under these or previous acknowledgment regulations."

for Federal acknowledgment without requiring that it be certified by the governing body of the Golden Hill group. 17/

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1 and 25 C.F.R. § 83.11, and subject to the supplemental proceeding discussed above, the Assistant Secretary's Final Determination is affirmed. Upon completion of the supplemental proceeding, the Board will issue a decision either finally affirming or vacating the Assistant Secretary's Final Determination and will refer five issues in all to the Secretary))the issue just stated and the four issues stated above. 18/

_____
Anita Vogt
Administrative Judge

I concur:

_____
Kathryn A. Lynn
Chief Administrative Judge

17/ The Board finds nothing in the materials before it which indicates either that BIA required Petitioner to submit certification or that Petitioner submitted it. Even so, it reaches no conclusion as to whether such certification was, in fact, required or submitted.

18/ Petitioner's request for oral argument and Requester's request for an evidentiary hearing are denied.